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No. 99-739

Supreme Court, U.S.
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In The Supreme Court of the United States

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,

Petitioner,

v.

DAVINE ALEXANDER, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

Edward G. Kramer #0024873
Counsel of Record
Kenneth J Kowalski #0024878
David G. Oakley #0068362
KRAMER & ASSOCIATES, L.P.A.
3214 Prospect Avenue
Cleveland, Ohio 44115-2600
(216) 431-5300

Alan C. Rossman #0019893
330 Standard Building
Cleveland, Ohio 44113
(216) 621-7292

Attorneys for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTIONS PRESENTED

1. Whether an International Union can be held liable under Title VII and 42 U.S.C. § 1981 under an agency theory for the discriminatory actions of an affiliated local on a record including facts such as: the International was the signatory on a National Maintenance Agreement containing a clause requiring the International to insure that all applicable civil rights laws will be complied with; the International delegated its referral authority to an affiliated local while on notice that the affiliated local had engaged in a historical pattern of discrimination based in part upon the application of a rule dictated by the International Constitution; and the International Union was on notice of continuing discrimination by the local union in its referral and membership policies.

2. Whether an International Union which has delegated its responsibility as to referrals under a contract signed by the International to a local affiliate with an historical pattern of discrimination is under an affirmative obligation to investigate charges of discrimination by the local which stem in part from the application of a rule created by the International Union.

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October Term 1999

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Edward G. Kramer #0024873
Counsel of Record
Kenneth J. Kowalski #0024878
David G. Oakley #0068362
KRAMER & ASSOCIATES, L.P.A.
3214 Prospect Avenue
Cleveland, Ohio 44115-2600
(216) 431-5300

Alan C. Rossman #0019893
330 Standard Building
Cleveland, Ohio 44113
(216) 621-7292

Attorneys for Respondents

STATEMENT OF THE CASE

A. Factual Background

Respondents incorporate by reference the statement of facts in the opinion of the Sixth Circuit Court of Appeals, Pet. App. 2a-8a, and the findings of fact by the District Court. Pet. App. 75a-95a. In addition, Respondents wish to call the Court's attention to certain facts omitted from Petitioner's recitation.

Regarding the National Maintenance Agreement signed by Petitioner Laborers International Union of North America ("LIUNA") in 1985, it is important to note that the agreement was "between the employer and the International Union only." It is true as pointed out by Petitioner that "no LIUNA representatives or agents were involved" in the administration of the referral system for the Perry Plant. Petitioner neglected to mention that "the Maintenance Agreement provided that Local 496 was to act as LIUNA's agent in filling all labor vacancies at Perry." Pet. App. 5a. In addition, while the Project Labor Agreement (PLA) provided that union membership and constitutional provisions would not affect referrals, the Maintenance Agreement contains no such provision.

The District Court also found that LIUNA was aware of over 50 discrimination charges filed against Local 496 because the business manager of Local 496 had informed International Union Regional Representatives Thomas J. Arconti and Charles Sutton who, in turn, notified the International's General President of the charges. Further, LIUNA had its own arrangement with the Equal

Employment Opportunity Commission to forward to it copies of charges filed against affiliated locals, including Local 496. Finally, the District Court found that LIUNA had the power and authority under its constitution to intervene in the affairs of its affiliate local union to eliminate discriminatory activities. Pet App.93a-95a.

B. Proceedings Below

Respondents' disagreement with Petitioner's characterization of the lower court holdings is discussed in the argument that follows. As to the proceedings in the lower courts, Respondents wish to add that, following the District Court's judgment as to liability, LIUNA moved for reconsideration three times. All three of its motions were denied. The second of those motions, styled a Motion for Clarification or for Reconsideration, was referred to Magistrate Judge Hemann, who recommended denial of the motion. Her report and recommendation, which was subsequently adopted by Judge O'Malley, is reported as *Alexander v. Local 496*, 860 F.Supp. 410 (N.D.Ohio 1994).

REASONS FOR DENYING THE WRIT

In petitioning the Court to review the lower court decisions in this case, Petitioner Laborers' International Union of North America (LIUNA) is primarily asking the Court to conduct an in-depth factual inquiry to determine whether the lower courts properly applied the law to the facts as presented in the record. LIUNA understandably disagrees with the factual conclusions the lower courts reached and, in addition, seems to challenge the validity of

one of the theories of liability applied here. Petitioner also makes unsupported assertions that the lower court decisions provide dangerous precedent that could lead to dire consequences for both international unions and parent corporations.

The Court should deny Petitioner's request for review for a number of reasons. First, even if this Court were inclined to accept for review a case in which its primary task on review would be to determine whether the facts in the record support the judgment,[1] as is shown below, under the proper clearly erroneous standard of review, the Court would have to affirm. Moreover, as to the legal arguments raised by Petitioner, the lower Courts both applied theories of liability that have been consistently recognized by other courts, including those courts whose opinions are cited and relied on by LIUNA. And while Petitioner makes exaggerated claims of the possible far-reaching effects of the decisions below, especially as to the affirmative duty theory of liability, a more sober review of the holdings below indicates that there is nothing new here beyond an unusual factual record that supports the finding that LIUNA can be held liable under both the vicarious liability and affirmative action theories. That courts have not found liability under one or both of these theories on different facts undercuts Petitioner's argument that this case

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[1]Of course, such a role is not one in which the Court should place itself: "A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

deserves the Court's attention. Because the decisions below are in accordance with settled law, the petition should be denied.

I. THIS CASE TURNS ON FACTUAL DETERMINATIONS AND WAS CORRECTLY DECIDED BY THE LOWER COURTS

The U.S. Court of Appeals for the Sixth Circuit determined that LIUNA was both independently and vicariously liable for the historical pattern and practice of discrimination by Local 496. Either finding is sufficient to support the judgment of the Court of Appeals.

The Court of Appeals affirmed the District Court's finding that an agency relationship existed between LIUNA and Local 496. The factual basis for this finding is interwoven into the findings of fact of the District Court and will not be fully reiterated here. Some of the key points are: Local 496 had a historical pattern of racial discrimination which pre-dated the Perry Nuclear Power plant project; the working in the calling rule which was responsible in part for the disparate impact; LIUNA was responsible for the creation of the working in the calling rule; the National Maintenance Agreement which provided for Local 496 to be the exclusive hiring hall for work at Perry was negotiated and signed by LIUNA; the National Maintenance Agreement requires that a signatory employer hire workers in accordance with the hiring procedure existing in the territory where the work is performed; LIUNA delegated its hiring authority under the National Maintenance Agreement to Local 496; and that, pursuant to the National Maintenance Agreement, LIUNA

assumed the non-delegable duty to insure that all hiring was done in a non-discriminatory manner.

The District Court further found that the Constitution of LIUNA created the working in the calling requirement which formed the basis of the historical discrimination against blacks practiced by Local 496. The Court of Appeals noted "having approved a practice of the local that was later found to be discriminatory in effect, the international would surely have been held accountable for the local's conduct under the agency standard of the common law." Pet. App. 24-25a (*quoting Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1428 (D.C.Cir. 1988), *cert. denied*, 109 S. Ct. 3155 (1989)). The Court of Appeals, having determined that the historical pattern and practice of discrimination practiced by Local 496 was directly related to LIUNA's working in the calling rule, stated that "we are baffled and amazed as to how LIUNA can contend that it did not instigate, support, ratify, or encourage a policy that it created." Pet. App. 24a. This holding is in line with similar decisions of other appellate courts. *See, Kaplan v. IATSE*, 525 F.2d 1354 (9th Cir. 1975) (noting that Title VII is violated by "the failure of an international union to act when aware of discrimination resulting from a collective bargaining agreement" that was negotiated by the international itself); *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 736 n.32 (5th Cir. 1976) (stating that International Unions who are parties to national agreements have a duty under Section 1981 to inquire into the effect of contract provisions when it is reasonable to assume that such provisions might lead to discrimination, and that international unions have an affirmative obligation to protect members from agreements that they help negotiate when such agreements "lock in" past discrimination.) *See also, United*

States v. Virginia Electric and Power Co., 327 F. Supp. 1034, 1042 (E.D.Va.1971) (holding the international liable for the discriminatory results of a collective bargaining agreement to which it was a signed party).

LIUNA erroneously characterizes the holding of the U.S. Court of Appeals for the Sixth Circuit to be based upon a finding of mere acquiescence. (Pet. p. 19) The language of the opinion clearly refutes this position. LIUNA argues in effect that the only basis of the finding of liability on the part of Local 496 related to its administration of the project labor agreement ("PLA"). This again inaccurately characterizes the majority opinion. The Sixth Circuit panel determined that there was an ongoing history of discrimination practiced by Local 496, and that the referral practice under the PLA was the most recent example of such discrimination. LIUNA's affirmative duty to take action to remedy past discrimination by Local 496 likewise followed from the fact that LIUNA created the rule which resulted in the disparate impact and served to lock in past discrimination.

II. THE THEORIES OF LIABILITY UNDER WHICH LIUNA WAS FOUND LIABLE ARE VALID AND IN ACCORDANCE WITH SETTLED LAW

The District Court found that Local 496 was guilty of intentional discrimination against class members in both its membership and job referral policies, and that LIUNA was liable under both agency and affirmative duty theories. Pet. App. 105a-106a. Under the agency theory, LIUNA was held liable according to principles of vicarious liability. The second theory held LIUNA to primary liability based upon an affirmative duty to oppose known discrimination by

its local. Both theories have been applied to questions of liability of international unions by a number of courts. Both require a careful analysis of the facts of a specific case to determine whether liability can be found.

A. Vicarious Liability

Agency doctrines have often been employed to find labor unions liable for the acts of their agents. *Local 1814, Int'l Longeshoremen's Assoc. v. NLRB*, 735 F.2d 1384, 1394 (D.C. Cir.1984). *See also*, *Amendolare v. Schenkers Intern. Forwarders, Inc.*, 747 F. Supp. 162, 170-71 (E.D.N.Y. 1990) (holding that apparent authority could be used to find labor union liable under RICO for negligence or acquiescence in allowing criminal element to infiltrate its organization). Generally, the existence and scope of agency relationships are factual matters. *Metco Products, Inc. v. NLRB*, 884 F.2d 156 (4th Cir. 1989); *N.L.R.B. v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Local 1814, Int'l Longshoremen's Ass'n*, 735 F.2d at 1394. Whether the law imposes liability on an international union for discriminatory acts of a local affiliate depends on the entities' interrelationship with respect to the act from which liability stems. *Sinyard v. Foote & Davies Div. of McCall Corp.*, 577 F.2d 943, 945 (5th Cir. 1978). *See also*, *Glus v. G.C. Murphy Co.*, 629 F.2d 248 (3d Cir. 1980), *vacated*, 451 U.S. 935, 101 S. Ct. 2013, 68 L. Ed. 2d 321 (1981), *and on remand aff'd in relevant part*, 654 F.2d 944 (3d Cir. 1981) (International union held liable as sole signatory to collective-bargaining agreement for a portion of the period during which discrimination took place); *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 851 (5th Cir.1977) (affirming district court's holding that the international

union was liable based on the fact that the "international would generally provide advisors to review and often comment upon the local's bargaining positions," and the local would submit contracts to the international for approval); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270-71 (4th Cir.1976) (international held liable where the vice president of the international acted as "advisor" to the local, played active role in negotiations for bargaining agreements in 1971 and 1974, and all collective bargaining agreements needed the approval of the international); *Sagers*, 529 F.2d at 737 (international union held liable under Title VII due to its involvement with the contracts at issue).

There is nothing new here. As these cases indicate, agency law has long been applied in cases involving the question of an international union's liability for actions of a local. As pointed out by Petitioner, in some cases the courts find that no agency relationship exists that would support a finding that an international is liable for the actions of a local. *E.g.*, *Brenner v. Local 514*, 927 F. 2d 1283 (3d Cir. 1991) (after very fact-specific inquiry, court notes that International not party to collective bargaining agreement and holds that local not acting as agent); *Phelan v. Local 305*, 973 F. 2d 1050 (2d Cir. 1992) (court looks carefully at record to decide that LMRA claims for failure to refer a member for jobs due to internal local union politics do not implicate United Association); *Shimman v. Frank*, 625 F. 2d 80 (6th Cir. 1980) (after thorough analysis of facts, court finds international union not liable

under common law agency principles)[2]; *Sinyard*, 577 F.2d 943 (after careful examination of the facts, court finds lack of involvement of international in challenged activities); *Chapa v. Local 18*, 737 F. 2d 929 (11th Cir. 1984) (looking at specific facts, court holds that presence of international officers at local meetings, in which one international official participated in his capacity as officer of local and the other merely observed, not sufficient to establish agency relationship).

What is common in both sets of cases is the care with which the courts view the factual record in trying to determine whether an international union can be held vicariously liable for the actions of a local union under agency principles, because the agency relationship determination is very dependent on the facts of the specific case: "The diverse situations possible in the varied relationships between parent and local unions make individual examination of the facts, rather than a mechanical application of assumptions, a vital necessity." *Sinyard*, 577 F. 2d at 947. The vicarious liability determination is quite fact-specific. As discussed above, the lower courts in this case made detailed factual findings on the way to their liability finding as to the International and it is these findings with which the International disagrees.

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[2] Though the result in this prior decision of the Sixth Circuit differs from the case at hand, the court was consistent in both cases in carefully reviewing the factual record to determine whether an agency relationship could be found under common law agency principles. Thus, the law in the Sixth Circuit is consistent with that of all the other circuits that have dealt with these issues.

Petitioner complains that the lower courts premised liability solely on LIUNA's failure to remedy the discrimination of Local 496. However, Petitioner conveniently ignores one of the crucial facts establishing an agency relationship: LIUNA signed the National Maintenance Agreement and gave Local 496 the responsibility to act as its agent in making referrals. Indeed, Local 496 had sole responsibility for referrals even though half of the referrals were to go to Local 860. This arrangement enabled the business agent of Local 496 to send all requests for black laborers to Local 860, thus avoiding referring any members of the class. But, more importantly for this Court's purposes, what is lacking from Petitioner's argument is an indication that the lower courts applied a wrong standard of law. Of course, such an argument would be unavailing, since both the District Court and the Court of Appeals specifically discussed and applied the same common law agency principles that are set forth by Petitioner as controlling. For instance, the Court of Appeals relied upon and quoted both *Carbon Fuel v. United Mine Workers*, 444 U.S. 212, 217-18 (1979); the case upon which Petitioner places the heaviest reliance,[3] as well as

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[3] In that case, the Fourth Circuit carefully looked at the factual circumstances and determined that in light of the bargaining history and the specific terms of the collective bargaining agreement, the International could not be held vicariously liable. *Carbon Fuel Co.*, 582 F.2d at 1350. This Court affirmed, relying on the common law agency theory. 444 U.S. at 216. In the present action the lower courts applied the same agency principles to such factual circumstances as LIUNA being a signatory to the National Maintenance Agreement, which imposed duties and allowed the local, as agent of LIUNA, to fill vacancies at the Perry Nuclear Power Plant, and arrived at a different result.

Sinyard, 577 F. 2d at 945, upon which Petitioner also extensively relies.

The leading case on these issues is *Berger*, 843 F. 2d 1395; which, as pointed out by Petitioner, dissenting Judge Batchelder said "aptly ties together the existing case law and sets forth the correct approach." Pet. App. 59a n.16. Virtually all decisions dealing with these issues since *Berger* use it as a starting point. So did the Sixth Circuit in its decision below, paraphrasing *Berger* at length. Pet. App. 22a. The Court made clear that it was applying the common law agency principles espoused by the *Berger* court for such determinations. That Petitioner is unhappy with the result of that application is not grounds for review by this Court.

B. Affirmative Duty

In *Berger*, the court recognized that in certain circumstances a labor organization's failure to act to prevent discrimination by others "may be an independent basis for liability under Title VII and section 1981." *Berger*, 843 F. 2d at 1429. In that case the court did not reach the question of whether the International union could be held liable in that way for breaching an affirmative duty to oppose discrimination by its local. Other courts have found international unions to be in breach of affirmative obligations to act when aware of discrimination. *Kaplan*, 525 F.2d at 1360; *Myers*, 544 F.2d at 850.

Petitioner seems to be arguing that an international union can never be held liable for discrimination by a local union under an affirmative duty theory. This is contrary to

Berger and other courts who have found the possibility of such liability. It is true that a number of courts have rejected claims of liability premised on affirmative obligations, but those decisions are based on the facts presented in those cases. None of the decisions precludes the possibility of such a claim.

In the instant case, the District Courts below made factual findings that LIUNA was or should have been aware of the discriminatory practices of Local 496 but refused to investigate or take any action whatsoever. Pet. App. 95a. Of course that refusal to investigate must be viewed in the context of LIUNA's delegation to the local of the referral duties under the contract it signed and the numerous indications of complaints about the way the local undertook to fulfill those referral duties. As the material in its files shows, LIUNA was on notice of Local 496's discriminatory policies since at least May of 1983. Yet, LIUNA admitted that it did nothing to investigate the many charges of discrimination against the Local.

LIUNA adhered to a "hear no evil, see no evil" approach in spite of being regularly informed of charges filed against the local. Indeed, LIUNA defended on the ground that it did nothing to investigate the charges. LIUNA's argument is in direct conflict with the broad remedial purposes of Title VII and Section 1981, as well as LIUNA's duties under the National Maintenance Agreement. LIUNA cannot remain wilfully blind in the face of numerous charges of discrimination against a local union which it has designated its agent to handle referrals to a project - especially when that local uses LIUNA's own constitutional provision to effect that discrimination - and

then cite its own deliberate inaction as evidence that it did not have knowledge of the merit of the charges.[4] *Macklin v. Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979, 989 (D.C. Cir. 1973)(failure of an international union to take action after becoming aware of discrimination resulting from a collective bargaining agreement constitutes a Title VII violation).

LIUNA's cites to the concurring dictum of *Goodman v. Lukens Steel Co*, 482 U.S. 656, 688 (1987), which states "an affirmative duty to oppose employer discrimination would work [a disruption in the basic policies of the labor laws]." (emphasis added). Here it is the discrimination by the local union, not an employer,

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[4] LIUNA's "hear no evil, see no evil" argument is similar to an argument rejected by the United States Supreme Court in *Am. Soc. of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 569-574 (1982) (distinguishing *UMWA v. Coronado Coal Co.*, 259 U.S. 244 (1922). The case involved a private cause of action under the antitrust laws. The Defendant, a non-profit association, argued that it could not be held liable under an "apparent authority" theory, and that it was only liable if it affirmatively ratified the actions of it agents. In rejecting this approach, the Supreme Court noted that a "principal purpose of the antitrust private cause of action. . . . is, of course, to deter anticompetitive practices." *Id.* at 572 (citations omitted). The court stated that under defendant's rule, the defendant "could avoid liability by ensuring that it remained ignorant of its agents' conduct, and the antitrust laws would therefore encourage ASME to do as little as possible to oversee its agents." *Id. See also, Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779 (11th Cir.1992) (common law agency principles broadly construed under the NLRA due to "clear legislative policy to remove all taint of an employer's compulsion, domination, or influence.") (citations omitted). Title VII and §1981 are similarly remedial and deterrent in nature.

which is challenged. This differs substantially from the situation described in the *Goodman* concurrence. LIUNA licenses the local and has greater control over its actions. LIUNA lends its name and credibility to the Local. As the majority opinion in the Court of Appeals points out (Pet. App. 23a n.7), the question of whether an agency relationship exists between an employer and a union, traditionally on opposite sides in the structure of labor relations, is very different than the question as to such a relationship between an international and one of its affiliates. More instructive is the majority opinion in *Goodman*, which held the union liable for deliberate inaction. *Id.* at 666.

The situation is also substantially different from the labor cases cited by LIUNA. Neither strikes nor lockouts are *per se* prohibited. *See, e.g., American Shipbuilding Company v. NLRB*, 380 U.S. 300, 85 S.Ct. 955 (1965). In sharp contrast, racial discrimination is prohibited by Title VII and § 1981.[5] These statutes are remedial in nature, designed to remedy the lingering effects of past discrimination. *See, e.g., Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505, 511 (6th Cir. 1991).

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[5] Although a strike in breach of a no strike clause is prohibited, it is *mal in prohibitum*, rather than *mal in se*.

LIUNA had knowledge of the surrounding circumstances of Local 496 via its contacts with the EEOC and communications from regional officials of the International Union. Moreover, LIUNA had negotiated and signed the agreement which authorized Local 496 to act as its agent when referring individuals to work at the Perry site. Finally, and most importantly, the International Union acquiesced in the discriminatory activities of Local 496. Unlike the purely economic issues involved in the cases cited by LIUNA, there is a moral dimension to the issues presented here.

III. THIS CASE PRESENTS NO ISSUE REQUIRING REVIEW BY THIS COURT

As discussed above, the lower courts in deciding this case applied settled law as regards the liability of LIUNA. LIUNA's real quarrel with the decisions below concerns the application of the facts to that law. Thus, this is not a case meriting review by this Court.

Moreover, the dire consequences predicted by LIUNA concerning the likelihood that international unions will now be subject to suit for any alleged civil rights violations of any of their affiliates as a result of the holding by the Sixth Circuit in this case will simply not occur. Again, the principles of law applied here are hardly novel. It is only under the type of egregious facts found by the District Court in this case that an international union has reason to fear the possibility of liability. Petitioner should not doubt the ability of the federal courts to competently distinguish cases in which the facts do not support liability under either accepted theory from those in which the facts

do. *See, e.g., Laughon v. International Alliance of Theatrical Stage Employees*, 1999 U.S. Dist. LEXIS 4783, *24 (N.D. Cal. April 2, 1999)[unreported]; in which the court cited to the District Court opinion in this case for its affirmative duty holding, yet found that based upon the facts presented in that case, the international union could not be held liable under either the vicarious liability or the affirmative duty theories.

Nor is it likely that the decisions below would be utilized to create heretofore unforseen liabilities for corporate parents for the activities of subsidiaries or on affiliated employers, as suggested by Petitioner. Again, the decisions below do not make new law in the international-local union context, let alone in another context. Furthermore, the holdings of *Berger* and its progeny have been limited to the union context. For instance, in a recent opinion of the D.C. Circuit, that court, commenting on the applicability of its own decision in *Berger* to the corporate liability context, stated: "But the company does not explain why that decision--by its own terms limited to the union context and based upon caselaw and principles unique to that context, *see 843 F.2d at 1427-30*--sensibly could be extended as a requirement for vicarious liability of a company for the actions of its employee-agents. We do not think it can." *Mekuria v. Holiday Universal, Inc.*, 1999 U.S. App. LEXIS 10621, *6 (D.C. Cir. May 5, 1999) [unreported].

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

EDWARD G. KRAMER #0024873
Counsel of Record
KENNETH J. KOWALSKI #0024878
DAVID G. OAKLEY #0068362
Kramer & Associates, L.P.A.
3214 Prospect Avenue
Cleveland, Ohio 44115-2600
(216) 431-5300

ALAN C. ROSSMAN #0019893
330 Standard Building
Cleveland, Ohio 44113
(216) 621-7292

ATTORNEYS FOR RESPONDENTS